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DRAFT

EXPLANATORY NOTES ON
THE CANCELLATION OF THE BREEDER'S RIGHT
UNDER THE 1991 ACT OF THE UPOV CONVENTION

Document prepared by the Office of the Union

*to be considered by the Administrative and Legal Committee Advisory Group
at its ninth session, to be held in Geneva on October 14 and 17, 2014*

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Note for Draft version

Strikethrough (highlighted) indicates deletion from the text of document UPOV/EXN/CAN/1.

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Double strikethrough and **double underlining** indicate changes to document UPOV/EXN/CAN/2 Draft 1

Endnotes provide background information when considering the draft version, not to be retained in the approved version of the document.

Footnotes to be retained in the published version of the document.

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EXPLANATORY NOTES ON THE CANCELLATION
OF THE BREEDER'S RIGHT
UNDER THE UPOV CONVENTION

PREAMBLE

1. The purpose of these Explanatory Notes is to provide guidance on the "Cancellation of the Breeder's Right" under the International Convention for the Protection of New Varieties of Plants (UPOV Convention). The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned.
2. Section II of these Explanatory Notes provides guidance on certain aspects of the provisions of cancellation of the breeder's right contained in Article 22 of the 1991 Act of the UPOV Convention and Article 10(2) to (4) of the 1978 Act of the UPOV Convention.

SECTION I: PROVISIONS ON THE CANCELLATION OF THE BREEDER'S RIGHT

3. The provisions on the cancellation of the breeder's right contained in Article 22 of the 1991 Act of the UPOV Convention and Article 10(2) to (4) of the 1978 Act of the UPOV Convention are reproduced below:

1991 Act of the UPOV Convention

Article 22

Cancellation of the Breeder's Right

(1) *[Reasons for cancellation]* (a) Each Contracting Party may cancel a breeder's right granted by it if it is established that the conditions laid down in Articles 8 or 9 are no longer fulfilled.

(b) Furthermore, each Contracting Party may cancel a breeder's right granted by it if, after being requested to do so and within a prescribed period,

- (i) the breeder does not provide the authority with the information, documents or material deemed necessary for verifying the maintenance of the variety,
- (ii) the breeder fails to pay such fees as may be payable to keep his right in force, or
- (iii) the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.

(2) *[Exclusion of other reasons]* No breeder's right shall be cancelled for reasons other than those referred to in paragraph (1).

1978 Act of the UPOV Convention

Article 10

[Nullity and] Forfeiture of the Rights Protected

[...]^[1]

(2) The right of the breeder shall become forfeit when he is no longer in a position to provide the competent authority with reproductive or propagating material capable of producing the variety with its characteristics as defined when the protection was granted.

(3) The right of the breeder may become forfeit if:

- (a) after being requested to do so and within a prescribed period, he does not provide the competent authority with the reproductive or propagating material, the documents and the information deemed necessary for checking the variety, or he does not allow inspection of the measures which have been taken for the maintenance of the variety; or
- (b) he has failed to pay within the prescribed period such fees as may be payable to keep his rights in force.

(4) The right of the breeder may not [be annulled or] become forfeit except on the grounds set out in this Article.

¹ Provisions in paragraph 1 of Article 10 of the 1978 Act concern nullity of the rights protected (see Explanatory Notes on the Nullity of the Breeder's Right under the UPOV Convention (document UPOV/EXN/NUL/1)).

SECTION II: CERTAIN ASPECTS OF THE PROVISIONS
ON THE CANCELLATION OF THE BREEDER'S RIGHT

4. These explanatory notes provide guidance on certain aspects of the provisions on the cancellation of the breeder's right contained in Article 22 of the 1991 Act of the UPOV Convention and Article 10(2) to (4) of the 1978 Act of the UPOV Convention.

Explanatory notes - Paragraph (1)

(1) [Reasons for cancellation] (a) Each Contracting Party may cancel a breeder's right granted by it if it is established that the conditions laid down in Articles 8 or 9 are no longer fulfilled.

(b) Furthermore, each Contracting Party may cancel a breeder's right granted by it if, after being requested to do so and within a prescribed period,

(i) the breeder does not provide the authority with the information, documents or material² deemed necessary for verifying the maintenance of the variety,

(ii) the breeder fails to pay such fees as may be payable to keep his right in force,

(iii) the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.³

5. The cancellation of a breeder's right means that, from a given date, the breeder's right is no longer valid and the authorization of the breeder of the variety is no longer required for any of the acts which are covered by the scope of the breeder's right. A breeder's right which has been cancelled was valid until the date of cancellation and was, in particular, valid at the time of granting. ~~In~~ **By** contrast, when a breeder's right is declared null and void, it is equivalent to pronouncing that it was an invalid right and should not have been granted in the first instance (see Explanatory Notes on the Nullity of the Breeder's Right under the UPOV Convention (document UPOV/EXN/NUL/1)).

6. The cancellation of a breeder's right is different from the surrender or renunciation of the breeder's right. Surrender or renunciation of the breeder's right is a unilateral decision of the holder of the breeder's right that is not linked to compliance with any obligation under the UPOV Convention. The holder of the breeder's right decides on an early termination by giving notice to the authority granting breeders' rights.

Proposal by New Zealand^a

To replace paragraph 6 as follows:

The cancellation of a breeder's right is different from the surrender or renunciation of the breeder's right. Cancellation is a decision and action of the granting authority, in contrast, ~~S~~-surrender or renunciation of the breeder's right is a unilateral decision of the holder of the breeder's right that is not linked to compliance with any obligation under the UPOV Convention. The holder of the breeder's right decides on an early termination by giving notice to the authority granting breeders' rights. It is important to emphasize that cancellation is an official action of the authority where surrender is voluntary and entirely the responsibility of the holder of the breeder's right.

² The corresponding provision in the 1978 Act (Article 10(2)) is mandatory and provides as follows: " The right of the breeder shall become forfeit when he is no longer in a position to provide the competent authority with reproductive or propagating material capable of producing the variety with its characteristics as defined when the protection was granted."

³ There is no corresponding provision to Article 22(1)(b)(iii) of the 1991 Act in the 1978 Act.

Cancellation proceedings and decisions

7. Cancellation proceedings may be initiated in response to a request made by a third party, or ex officio by the competent authority of the member of the Union concerned.

8. The authority, or authorities, with competence to decide on matters concerning cancellation of breeders' rights (e.g. authorities granting breeders' rights, judicial authorities) will be determined by the relevant legislation of the member of the Union concerned. The relevant legislation might, in addition to the legislation governing breeders' rights, include other legislation on substantive and procedural matters.

9. The UPOV Convention requires that decisions concerning the cancellation of breeders' rights be published (see Article 30(1)(iii) of the 1991 Act and Article 30(1)(c) of the 1978 Act.).

Contracting Party "may" cancel a breeder's right

10. ~~6~~ The UPOV Convention does not require members of the Union to introduce provisions for the cancellation of the breeder's right. Under the 1991 Act of the UPOV Convention, if the reasons for cancellation apply, the competent authority "may" cancel the breeder's right, i.e. there is no automatic obligation to cancel. Therefore, ~~S~~ subject to applicable legislation, the competent authority may take into account the particular circumstances. ~~and may decide to cancel a breeder's right or may.~~ For example, the competent authority may provide additional time to remedy the situation.

Cancellation of variety denominations

11. ~~7~~ Article 22(1)(b)(iii) of the 1991 Act of the UPOV Convention provides that the breeder's right may be cancelled if "the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination". The explanatory notes corresponding to paragraph (4) of Article 20 of the 1991 Act and of Article 13 of the 1978 Act ("Explanatory Notes on Variety Denominations under the UPOV Convention" (document UPOV/INF/12/2)) provide guidance on situations in which the variety denomination might be cancelled.

Verifying the maintenance of the variety

~~The CAJ-AG agreed to consider the development of guidance on the use of information, documents or material provided by the breeder for verifying the maintenance of the variety, as set out in paragraph 15 of document CAJ-AG/13/8/4, and guidance on the use of Test Guidelines for verifying the maintenance of the variety that were different from the Test Guidelines used for the examination of Distinctness, Uniformity and Stability ("DUS"), in conjunction with document CAJ-AG/13/8/7 "Matters concerning Variety Descriptions".~~

~~It is proposed to consider guidance on this matter in conjunction with document CAJ-AG/14/0/4 "Matters concerning variety descriptions" to be considered by the CAJ-AG at its ninth session to be held in Geneva, on October 14 and 17, 2014.~~

[Note: The CAJ-AG, at its eighth session, held in Geneva on October 21 and 25, 2013, agreed to the development of guidance on the following, which it proposed that the CAJ should invite the Technical Committee (TC) to consider in the first instance (see document CAJ-AG/13/8/10 "Report", paragraph 73):

(a) use of information, documents or material provided by the breeder for verifying the maintenance of the variety, as set out in paragraph 15 of document CAJ-AG/13/8/4 "Matters concerning cancellation of the breeder's right", with an explanation that the information, documents or material could be maintained in a different country; and ^b

(b) use of Test Guidelines for verifying the maintenance of the variety that were different from the Test Guidelines used for the examination of Distinctness, Uniformity and Stability ("DUS").

The CAJ, at its sixty-ninth session, held in Geneva on April 10, 2014, in accordance with the proposal by the CAJ-AG, agreed to invite the TC to consider the development of guidance on certain matters concerning variety descriptions, as set out in document CAJ/69/2, paragraphs 27 and 28 (see document CAJ/69/13 "Report", paragraph 19).

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- ^a Comments from New Zealand have been received and posted in the CAJ-AG/13 section of the UPOV website (see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285381.pdf):
- “6. [...] of the breeder’s right. *Cancellation is a decision and action of the granting authority in contrast to surrender or renunciation.....* It is important to emphasize that cancellation is an official action of the authority where surrender is voluntary and entirely the responsibility of the title holder.”
- ^b Comments from CropLife International have been received and posted in the CAJ-AG/13 section in the UPOV website (see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285382.pdf): “CropLife International wishes to support the proposal to develop guidance on the use of information, documents or material provided by the breeder for verifying the maintenance of the variety and offers its assistance in the drafting of such guidance.

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